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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

TASER INTERNATIONAL, )  
INC., et al., )  
 )  
Plaintiffs, )  
 )  
vs. ) Civil Action File  
 ) No.  
MORGAN STANLEY & ) 1:10-CV-03108-JOF  
CO., INC., ET AL. )  
 )  
Defendants. )

PROCEEDINGS BEFORE  
SPECIAL MASTER HENRY D. FELLOWS, JR.  
APRIL 7, 2011  
FELLOWS LABRIOLA, LLP  
SUITE 2300 SOUTH TOWER  
225 PEACHTREE STREET, NE  
ATLANTA, GEORGIA

CONTAINS CONFIDENTIAL PORTIONS  
PURSUANT TO PROTECTIVE ORDER

Reported by: Lynne C. Fulwood  
Certified Court Reporter

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1	your ruling with respect to the good	10:04:24
2	faith reliance on counsel defense.	10:04:27
3	That is the subject of Roman Numeral	10:04:31
4	III in the first order we did, dated	10:04:36
5	February 7th, 2011.	10:04:39
6	Who will speak for the plaintiff's	10:04:43
7	on that subject?	10:04:45
8	MR. ROSENWASSER: Hi, Mr. Fellows,	10:04:47
9	it's Steven Rosenwasser again and I	
10	will be speaking on the subject.	10:04:51
11	Basically plaintiffs would like	10:04:54
12	clarification on your ruling relating	10:04:57
13	to the use or potential use of the good	10:04:59
14	faith reliance on counsel defense in	10:05:02
15	this case.	10:05:04
16	As you pointed out a moment ago,	10:05:06
17	there has previously been motions	10:05:08
18	practice on the issue of the	10:05:11
19	plaintiff's concern that the defendants	10:05:14
20	may be in our view improperly waiting	10:05:17
21	to state whether or not they're going	10:05:21
22	to invoke a good faith reliance on	10:05:23
23	counsel defense in this case.	10:05:26
24	And in particular, our worry was	10:05:28
25	and remains that the defense were going	10:05:32

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1	to wait until very late in discovery or	10:05:34
2	maybe even after discovery to say	10:05:38
3	whether or not they're going to rely on	10:05:41
4	that defense at which time the	10:05:42
5	plaintiffs will be prejudiced because	10:05:44
6	we wouldn't have any discovery to wit	
7	we've already completed our	
8	depositions.	10:05:47
9	In the February order you had	10:05:47
10	referenced a moment ago, the Special	10:05:50
11	Master had ruled that in the event the	10:05:55
12	defendants raised the issue later on,	10:05:57
13	one potential course or consequence may	10:06:00
14	be that discovery is reopened to allow	10:06:05
15	to engage in discovery on that defense.	10:06:08
16	And the issue we have is while we	10:06:11
17	understand that that reopening	10:06:14
18	discovery or expanding discovery may be	10:06:16
19	one potential means of handling a later	10:06:20
20	raising of the good faith reliance	10:06:24
21	defense, the case law recognizes that	10:06:27
22	there are other potential consequences	10:06:29
23	to what we would believe to be an	10:06:32
24	untimely raising of the defense.	10:06:34
25	And what has happened is we became	10:06:36

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1 concerned that the defendants were 10:06:39  
2 taking your order to mean that if they 10:06:40  
3 raised the defense at summary judgment 10:06:43  
4 or at trial, the worst thing that would 10:06:46  
5 happen is that -- to them would be that 10:06:48  
6 basically the case would be delayed, 10:06:50  
7 discovery would be reopened and we'd 10:06:53  
8 have to start the process over again 10:06:56  
9 and that they were basically not -- 10:06:57  
10 that they were no longer in any danger 10:07:00  
11 of facing a finding that they had 10:07:03  
12 waived the defense by waiting too long 10:07:08  
13 no matter when they raised it.  
14 Rather than making the assumption 10:07:09  
15 that that's what their position was, we 10:07:11  
16 had contacted the defendant to confer 10:07:13  
17 on the issue and it is my understanding 10:07:15  
18 that their position is that there can 10:07:17  
19 be no waiver of the defense. And that 10:07:18  
20 by virtue of your ruling, the worst 10:07:22  
21 thing that can happen is that discovery 10:07:25  
22 reopens.  
23 So that's the issue that we wanted 10:07:28  
24 clarification on and we're here today I 10:07:31  
25 think to make a relatively simple 10:07:34

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1 request or at least in my view it is. 10:07:38  
2 We're not asking you to reconsider your 10:07:39  
3 order at this time or to say that we 10:07:41  
4 get discovery to any good faith defense 10:07:45  
5 or even find that there's been a waiver 10:07:45  
6 but what we want to do is just make 10:07:48  
7 clear that your order isn't foreclosing 10:07:50  
8 any of the options that are available 10:07:53  
9 under the case law in terms of what the 10:07:55  
10 consequences would be if defendants 10:07:58  
11 later raised a good faith reliance on 10:08:00  
12 counsel defense. 10:08:03  
13 By that I mean if they raised it 10:08:04  
14 at some point in late discovery or 10:08:07  
15 after, we can come to you or the court 10:08:09  
16 and perhaps get more discovery as you 10:08:11  
17 put in the order or perhaps argue that  
18 waiver is appropriate and that all 10:08:14  
19 those options are available as 10:08:16  
20 indicated in the cases cited in our 10:08:17  
21 briefs and that your order wasn't meant 10:08:22  
22 to foreclose the possibility of 10:08:24  
23 consequences beyond just reopening 10:08:26  
24 discovery in the event that defense is 10:08:27  
25 later raised.

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1           So I don't think it's valuable to           10:08:29  
2           debate now what the consequences could           10:08:32  
3           be and I understand the defendants may           10:08:34  
4           argue that the case law doesn't say           10:08:36  
5           that there could be a waiver but I want           10:08:38  
6           to at least make sure that that issue           10:08:40  
7           is preserved and that nobody is           10:08:42  
8           operating under the assumption that           10:08:44  
9           waiver is definitively off the table if           10:08:44  
10          the case law permits it.           10:08:47  
11           We ask today that we get           10:08:49  
12          clarification in the sense that you let           10:08:52  
13          the defendant know that in the event           10:08:54  
14          they raise it later, the plaintiffs           10:08:57  
15          have the right to seek any and all           10:08:57  
16          remedies available under the law and           10:09:01  
17          that the only remedy is not going to be           10:09:01  
18          just extending discovery.           10:09:05  
19          SPECIAL MASTER: All right. Who           10:09:06  
20          would like to speak on behalf of the           10:09:08  
21          defendants?           10:09:10  
22          MR. PEPPERMAN: This is Rick           10:09:12  
23          Pepperman for Goldman Sachs. I will           10:09:14  
24          briefly. I don't know whether anyone           10:09:17  
25          else has anything to add on this issue.           10:09:19

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1 I do think, however, that this is 10:09:21  
2 really a nonissue. At the outset let 10:09:24  
3 me state categorically at least on 10:09:29  
4 behalf of my clients, that there is no 10:09:33  
5 intent here at all or no plan at all 10:09:35  
6 here to sandbag the plaintiffs and wait 10:09:38  
7 until the eve of trial or summary 10:09:43  
8 judgment briefing or some later time to 10:09:47  
9 assert a defense of reliance on the 10:09:50  
10 advice of counsel. 10:09:54

11 As we've said before, the 10:09:56  
12 defendants have not yet asserted such a 10:09:57  
13 defense and at present do not intend to 10:10:01  
14 assert such a defense. You know, in 10:10:04  
15 terms of clarification of Special 10:10:08  
16 Master's order, you know, when Mr. 10:10:13  
17 Rosenwasser raised this issue with us, 10:10:15  
18 I think our only response was that from 10:10:18  
19 our perspective, we thought that the 10:10:21  
20 order was clear. 10:10:23

21 On page 11 it states, the defense 10:10:25  
22 of reliance on advice of counsel is not 10:10:31  
23 an affirmative defense and, therefore, 10:10:33  
24 may be asserted at a later time with 10:10:36  
25 the cites 08(c) and the relevant 10:10:38



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1	Georgia analog; however, if defendants	10:10:41
2	later elect to assert the defense of	10:10:46
3	reliance on advice of counsel in this	10:10:49
4	action, then the Special Master will	10:10:51
5	authorize plaintiff's to conduct	10:10:53
6	narrowly held discovery as to that	10:10:56
7	later asserted defense.	10:10:58
8	Our view was and is that the order	10:11:00
9	is clear and doesn't require	10:11:02
10	clarification.	10:11:03
11	SPECIAL MASTER: All right. Thank	10:11:05
12	you. Does anyone else wish to be heard	10:11:08
13	on that point?	10:11:09
14	MR. ROSENWASSER: Mr. Fellows,	10:11:15
15	Steven Rosenwasser. I think one	10:11:16
16	additional fact might be useful. We	10:11:17
17	served the interrogatories that you had	10:11:20
18	mentioned in the hearing asking the	10:11:21
19	defendants whether or not they intended	10:11:23
20	to raise a good faith reliance on	10:11:24
21	counsel defense.	10:11:28
22	And each of the defendants did	10:11:29
23	state as Mr. Pepperman indicated that	10:11:31
24	they don't currently intend on raising	10:11:31
25	it but none of them were willing to say	10:11:33

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1 in their response that they'll never 10:11:36  
2 raise it. 10:11:38

3 So they continue to leave the door 10:11:38  
4 open that it was a possibility later 10:11:41  
5 on, which is one of the reasons we 10:11:42  
6 followed up with an inquiry and for 10:11:44  
7 basically the same position we've  
8 always been in which is they say we're 10:11:46  
9 not doing it now but we're reserving 10:11:48  
10 the right to do it later. 10:11:51

11 SPECIAL MASTER: All right. Why 10:11:52  
12 don't -- we'll take this approach. 10:11:58  
13 Rather than me giving a ruling on each 10:12:00  
14 point, I'd like to go through all of 10:12:05  
15 these points and I may at the 10:12:07  
16 conclusion of this conference try to 10:12:11  
17 give you immediate rulings on certain 10:12:13  
18 of these points or may say that we'll 10:12:16  
19 bundle them all together in another 10:12:21  
20 written order, which I would be able to 10:12:24  
21 issue by Monday of next week. 10:12:27

22 I'm going to be out of the office 10:12:31  
23 tomorrow and while I'll have my 10:12:32  
24 computer with me, I won't be able to 10:12:36  
25 work on this case tomorrow. I'll have 10:12:38

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1	and who have made voluntarily the	12:05:37
2	choice to have their records and their	12:05:39
3	information as well as their trading	12:05:41
4	kept by Mr. Scott.	12:05:43
5	It would be the same thing as if	12:05:46
6	Morgan Stanley said when asked for data	12:05:48
7	that it gets from a vendor that because	12:05:50
8	the data is at a vendor, Morgan Stanley	12:05:54
9	shouldn't have to bear the cost of	12:05:59
10	making the production.	12:06:03
11	MR. ROSENWASSER: We've given them	12:06:04
12	all the documents so I'm not sure what	12:06:05
13	they're referring to. We're talking	12:06:06
14	about the cost of Chester's personal	12:06:07
15	e-mails.	12:06:10
16	MR. WISE: Through the use of the	12:06:13
17	search terms, we are limiting that to	12:06:14
18	only the items that relate to this case	12:06:16
19	and the trading that he did for the	12:06:21
20	plaintiffs in this case.	12:06:23
21	MR. ROSENWASSER: I'm happy to	12:06:25
22	brief all this. I don't know how much	12:06:27
23	Mr. Fellows wants to hear on this.	12:06:29
24	SPECIAL MASTER: You can each do	12:06:32
25	it by e-mail or in a Word document.	12:06:33

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1           You won't be prejudiced if you choose           12:06:36  
2           to do it by e-mail as to this cost           12:06:38  
3           issue, too. So I'll incorporate that           12:06:42  
4           into the order that I'll get out by           12:06:46  
5           Monday, April 11th.           12:06:49

6                   So let me tell you what I'm going           12:06:52  
7           to rule upon verbally now that the           12:06:55  
8           Court Reporter is recording and will           12:06:59  
9           memorialize these rulings in the           12:07:05  
10          written order Monday. Then I'll tell           12:07:06  
11          you what I cannot rule upon yet.           12:07:08

12                   First of all, with respect to item           12:07:11  
13          one, clarification on our initial order           12:07:13  
14          with respect to the good faith reliance           12:07:18  
15          on counsel defense, I find that there           12:07:20  
16          is no need to clarify or elaborate on           12:07:24  
17          our initial order with respect to that           12:07:30  
18          defense.           12:07:33

19                   My order speaks for itself as to           12:07:35  
20          what I think is the appropriate remedy           12:07:38  
21          in the event that the defendants decide           12:07:41  
22          to assert the defense of reliance on           12:07:45  
23          counsel. So I'm not going to change my           12:07:50  
24          ruling or modify it in any respect.           12:07:54

25                   As to item two, a date certain for           12:07:58